APPENDIX A

The All Writs Act, 28 U.S.C. § 1651, provides in pertinent part:

> Section 1651(a). The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1404, provides in pertinent part:

> Section 1404(a). For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

67 Civ. 183

GEORGE E. FARRELL, as Administrator of the Estate of RALPH D. JOHNSON, deceased

and

GENEVIEVE SANTANA, individually and as Administratrix of the Estate of VICTOR SANTANA, deceased,

and

JOHN GUGLIUZZA, individually and as Natural Guardian of RONALD GUGLIUZZA, an infant, over the age of fourteen years,

and

MARGARET MANNING, individually and as next friend and guardian of the Person and Estate of SAMUEL DON MANNING, a minor,

and

WILLIAM KAY MILLER, as Temporary Guardian of the Estate of DAVID THOMAS, a minor,

and

ROSALIO TOBIAS, JR.,

and

IRENE COMMUNE, individually and as Administratrix of the Estate of ROBERT E. COMMUNE, deceased,

and

LORENZO GOMEZ, individually and as Temporary Administrator of the Estate of LUIS A. GOMEZ, deceased,

and

LORRAINE M. THOMAS, individually and as Administratrix of the Estate of DENNIS WISSELL, deceased,

and

JACK PASTER, individually and as Administrator of the Estate of RICHARD PASTER, deceased, *Plaintiffs*,

v.

AMERICAN FLYERS AIRLINE CORPORATION, *Defendant*.

67 Civ. 1630

WILLIAM MCGUIGAN, as Administrator of the Goods and Chattels, Rights and Credits of ROBERT F. MCGUIGAN, deceased, WILLIAM W. BART, as Administrator of the Goods and Chattels, Rights and Credits of WILLIAM RICHART BART, deceased, and LEO RAY BURNETT, SR., as Administrator of the Estate of LEO RAY BURNETT, JR., deceased, *Plaintiffs*,

v.

AMERICAN FLYERS AIRLINE CORPORATION, *Defendant*.

67 Civ. 302

WILLIAM P. KENNELLY and DOROTHY KENNELLY, as Administrators of the Goods, Chattels and Credits of WILLIAM T. KENNELLY, deceased, *Plaintiffs*,

v.

AMERICAN FLYERS AIRLINE CORPORATION, *Defendant*.

66 Civ. 2291

HELEN M. SCHMIDT, as Administratrix of the Goods, Chattels and Credits of RICHARD A. SCHMIDT, deceased, *Plaintiff*,

v.

AMERICAN FLYERS AIRLINE CORPORATION, *Defendant*.

67 Civ. 1562

DOROTHY WILLS, as Administratrix of the Goods, Chattels and Credits of LEMUEL WILLS, JR., deceased, *Plaintiff*,

v.

AMERICAN FLYERS AIRLINE CORPORATION, *Defendant*.

67 Civ. 1772

ELIZABETH HOLT DAVIDSON, individually and as Parent and Natural Guardian of BARRY W. HOLT, an infant, deceased, *Plaintiff*,

v.

AMERICAN FLYERS AIRLINE CORPORATION, *Defendant*.

McGOHEY, D. J.

The defendant moved under Fed. R. Civ. P. 42(a) to consolidate all of the above actions, and further moved, pursuant to 28 U.S.C. § 1404(a) to transfer them to the Eastern District of Oklahoma where they might have been brought since the defendant is doing business there.[1]

All of the actions arise out of a crash of one of the defendant's airplanes on April 22, 1966, near Ardmore, Oklahoma. The plane, under military charter, was carrying ninety-two soldiers and six employees of defendant. Only fifteen soldiers survived the crash. The plaintiffs are either survivors, guardians of survivors or administrators of the estates of deceased soldier-passengers.

In urging consolidation the defendant alleges, in the language of the Rule, that there are common questions of law or fact on the issue of liability. This can hardly be denied. Defendant's answers in all of the actions contain only a general denial and an "Act of God" defense. There is no claim that any plaintiff was contributorily negligent.

Two arguments are urged in opposition to the motion. It is asserted that while most plaintiffs allege negligence in the operation, maintenance and/or ownership of the air-

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[1] 28 U.S.C. § 1391(c).

plane, some have alleged only operational negligence. Plaintiffs urge denial of the motion because of this difference in legal theories. Any problems occasioned by this difference, however, could be obviated easily by recourse to the procedures available under Fed. R. Civ. P. 49.[2] Plaintiffs next contend that the motion for consolidation is an attempt to contravene an order denying the requested assignment of a Rule 2 Judge in the Farrell, Schmidt and Kennelly actions. Rule 2 of the General Rules of the Southern District of New York provides, in part:

> "(b) The . . . chief judge . . . upon his own motion or the motion of any party, may assign a long and complicated case to a judge for all purposes including the following: (1) to hear all motions and preliminary applications; (2) to conduct the pre-trial conference; and (3) to preside at the trial of the action."

The grant of a motion to consolidate would clearly not contravene that order. The motion for a consolidated trial, limited to the issue of liability, is granted.[3]

The next motion, to transfer these actions to the Eastern District of Oklahoma, is not the first such motion made by the defendant in an action arising out of this crash.[4] Two

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[2] Fed. R. Civ. P. 49 provides for special verdicts and for general verdicts accompanied by answers to interrogatories.

[3] Rando v. Luckenbach S.S. Co., 155 F. Supp. 220 (E.D.N.Y. 1957).

[4] Motions to transfer to the Eastern District of Oklahoma were granted in the following actions:

> Lara v. American Flyers Airline Corp., 66 Civ. 1308, N.D. Ill., Dec. 8, 1966; Turner v. American Flyers Airline Corp., 66 Civ. 1309, N.D. Ill., Dec. 8, 1966; Dawkins v. American Flyers Airline Corp., 66 Civ. 2165, N.D. Ill., Dec. 8, 1966, Wright v. American Flyers Airline Corp., Civ. Nos 66-

of the prior motions were denied by judges in this circuit: Schmidt v. American Flyers Airline Corp.,[5] and Scaramuzzo v. American Flyers Airline Corp.,[6] on facts not substantially different from those presented here.[7] Defendant urges, however, that two significant facts serve to distinguish the instant motion from the prior motions. The first is the increased number of cases now pending in the proposed transferee district. At the time of the prior motions only one action was pending there. To date, in addition to the fifteen actions pending in the Southern District of New York, there are nine actions pending in

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553, 66-554, D.S.C., Feb. 14, 1967; Helton v. American Flyers Airline Corp., Civ. No. 66-687, D.S.C., Feb. 14, 1967.

The opinions in the above motions are all annexed to the Bostwick affidavit in support of this motion.

Both the Illinois court and the South Carolina court noted that under their respective state's conflict of laws rule, the law of Oklahoma would control on the question of liability. This is not necessarily the law of New York. Dym v. Gordon, 16 N.Y. 2d 120, 209 N.E. 2d 792, 262 N.Y.S. 2d 463 (1965); Babcock v. Jackson, 12 N.Y. 2d 473, 191 N.E. 2d 279, 240 N.Y.S. 2d 743 (1963); Kilberg v. Northeast Airlines, Inc., 9 N.Y. 2d 34, 172 N.E. 2d 526, 211 N.Y.S. 2d 133 (1961).

[5] 260 F. Supp. 813 (S.D.N.Y. 1966).

[6] 260 F. Supp. 746 (E.D.N.Y. 1966).

[7] Defendant urges that at present, to facilitate the proposed transfer, it is offering to pay the costs of transporting plaintiffs, their counsel and witnesses to Oklahoma. This offer was presented during reargument of the Scaramuzzo motion. Despite this offer the motion was denied. 260 F. Supp. at 752. The precis of testimony expected to be elicited from defendant's proposed witnesses does not materially differ from that presented to the courts in support of the other two motions. This expected testimony, set forth on the issue of convenience of the witnesses, is considered no more compelling now than it was then.

In passing, it should be noted that both the Schmidt and Scaramuzzo cases have been settled and, therefore, plaintiff's arguments in opposition, to the effect that the present motion should be treated as a reargument of those motions and, as such, is untimely and improper, have not been considered.

the proposed transferee district; one action pending in the Eastern District of New York; one in the Eastern District of Arkansas; two in the Northern District of California; and one in the Central District of California.[8]

The courts in Schmidt and Scaramuzzo rejected arguments predicated on this, then hypothetical, situation. Those courts noted that even if all actions were transferred, the Oklahoma court would still have to research and decide questions of New York law, and that the prospects of having a single *consolidated* trial in Oklahoma were, and are, highly speculative.[9] This reasoning applies equally to the present motion. It should be noted further that the defendant has not demonstrated why the increased number of cases in the proposed transferee district compels a transfer "for the convenience of parties and witnesses" or "in the interest of justice." In fact, it appears that a transfer would do nothing more than shift the inconvenience from defendant to plaintiffs.[10]

The second factual distinction between the present motion and the prior motions to which defendant draws attention is that in both Schmidt and Scaramuzzo the plaintiffs were citizens of New York, whereas in the actions sought to be transferred by the instant motion some plaintiffs are not New York citizens. In light of the determination of the motion to consolidate, this argument carries little weight. Again, the reasons for denying the motions in Schmidt and

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[8] From the movant's affidavit, it appears that in all of the pending actions arising out of this crash, motions to transfer have been made or will be made in the near future.

[9] Schmidt v. American Flyers Airline Corp., 260 F. Supp. 813, 816-17 (S.D.N.Y. 1966); Scaramuzzo v. American Flyers Airline Corp., 260 F. Supp. 746, 750, 752 (E.D.N.Y. 1966).

[10] Schmidt v. American Flyers Airline Corp., supra note 9 at 815; Scaramuzzo v. American Flyers Airline Corp., supra note 9 at 751.

Scaramuzzo apply equally here and are, accordingly, adopted.[11]

The motion to transfer is denied.

Settle one order for both motions.

Dated: New York, N. Y., June 16, 1967.

JOHN F. X. McGOHEY
John F. X. McGohey
U. S. D. J.

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[11] Schmidt v. American Flyers Airline Corp., supra note 9 at 815: "The inconvenience of the . . . [local plaintiffs] outbalances the inconvenience of the ground observers, operations and medical witnesses [of defendant] . . ." Among the plaintiffs in the consolidate action, five are citizens of New York, two are citizens of New Jersey, and one is a citizen of Connecticut. From the affidavits it appears that defendant is not amenable to suit in either New Jersey or Connecticut, thus making New York a more convenient forum for these plaintiffs. The following conclusion of the court in Scaramuzzo is, therefore, relevant:

> "If the determination of this motion were to rest on the balancing of the convenience of the fact witnesses on the liability issue alone, the scales would not favor transfer; add to the weight against transfer, the inconvenience to the plaintiffs' witnesses on the issue of damages and the scales weigh heavily against transfer." Scaramuzzo v. American Flyers Airline Corp., supra note 9 at 749. The fact that all of the actions but one involving a New York survivor have been settled, does not alter the fact that the New York area survivors would still be witnesses on the question of liability. It should be additionally noted that none of the survivors are citizens of Oklahoma.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

September Term, 1967.

(Motion argued November 6, 1967
Decided November 22, 1967.)

Docket No. 31739

AMERICAN FLYERS AIRLINE CORPORATION,
Defendant-Petitioner,

v.

GEORGE E. FARRELL, as Administrator of the Estate of RALPH D. JOHNSON, deceased, *et al., Plaintiffs-Respondents.*

AMERICAN FLYERS AIRLINE CORPORATION,
Defendant-Petitioner,

v.

WILLIAM McGUIGAN, as Administrator of the Goods and Chattels, Rights and Credits of ROBERT G. McGUIGAN, deceased, WILLIAM W. BART, as Administrator of the Goods and Chattels, Rights and Credits of WILLIAM RICHARD BART, deceased, and LEO RAY BURNETT, SR., as Administrator of the Estate of LEO RAY BURNETT, JR., deceased, *Plaintiffs-Respondents.*

AMERICAN FLYERS AIRLINE CORPORATION,
Defendant-Petitioner,

v.

WILLIAM P. KENNELLY and DOROTHY KENNELLY, as Administrators of the Goods, Chattels and Credits of WILLIAM T. KENNELLY, deceased, *Plaintiffs-Respondents.*

AMERICAN FLYERS AIRLINE CORPORATION,
Defendant-Petitioner,

v.

DOROTHY WILLS, as Administratrix of the Goods, Chattels and Credits of LEMUEL WILLS, JR., deceased,
Plaintiff-Respondent.

AMERICAN FLYERS AIRLINE CORPORATION,
Defendant-Petitioner,

v.

ELIZABETH HOLT DAVIDSON, individually and as Parent and Natural Guardian of BARRY W. HOLT, an Infant, deceased, *Plaintiff-Respondent.*

AMERICAN FLYERS AIRLINE CORPORATION,
Defendant-Petitioner,

v.

HON. JOHN F. X. MCGOHEY, Judge of the United States District Court for the Southern District of New York,
Respondent.

Before: LUMBARD, *Chief Judge,*
MEDINA and HAYS, *Circuit Judges.*

Application for mandamus to review so much of an order of the United States District Court for the Southern District of New York as denies motions, under 28 U. S. C., Section 1404(a), to transfer the place of trial of five civil actions to the United States District Court for the Eastern District of Oklahoma, John F. X. McGohey, *Judge*. Opinion below reported at 42 F. R. D. 341. Petition denied.

MEDINA, *Circuit Judge:*

Judge McGohey having denied the motions of American Flyers Airline Corporation to transfer, pursuant to 28 U. S. C., Section 1404(a), several tort actions to the Eastern District of Oklahoma where an airplane crash occurred on April 22, 1966, we are urged to issue a writ of mandamus compelling the transfer. There is the usual aggregation of arguments supporting the contention that considerations of fairness and justice, the convenience of witnesses, stipulations for paying the expenses of transporting witnesses, and the requirements of sound judicial administration so far outweigh the reasons given by Judge McGohey for refusing to order the transfer as to make his ruling a "clear abuse of discretion." That Judge McGohey did exercise his discretion is abundantly plain. His opinion below is reported at 42 F. R. D. 341. Moreover, it cannot be doubted that we lack power under the All Writs statute, 28 U. S. C., Section 1651, to consider the pros and cons and issue the writ even if we should conclude that Judge McGohey's order was wrong and that we would have directed the transfer had the original application been addressed to us. The reason, as quoted from *De Beers Consol. Mines, Ltd.* v. *United States,* 325 U. S. 212, 217 (1945), by our brother Friendly in his concurring opinion in *A. Olinick & Sons* v. *Dempster Bros., Inc.,* 365 F. 2d 439, 446 (2 Cir. 1966), is that the All Writs statute cannot "be availed of to correct a mere error in the exercise of conceded judicial power," but can be used only "when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power."

The test is the one we announced as long ago as 1955 in *Torres* v. *Walsh*, 221 F. 2d 319 (2 Cir. 1955), *cert. denied*, 350 U. S. 836, citing a long line of Supreme Court cases to the effect that the writ may issue only "in really extraordinary causes."

What has brought down upon us this plague of ill-advised mandamus petitions in cases of transfer applications under 28 U. S. C., Section 1404(a), is the use, sometimes even in Supreme Court opinions, of the inherently ambiguous phrases "clear abuse of discretion," "clear cut abuse of discretion," and so on. The use of such misleading phrases is nothing short of an invitation to the defeated party, who seems always to be quite convinced that the judge is wrong, and who as often as not is also playing for delay, to apply for mandamus and give us a full scale review of every detail tending to support the transfer. Where it is evident as here that the Judge has exercised his discretion in a judicial manner, and that the case before us is not a "really extraordinary cause" we should summarily deny the petition for mandamus. In this connection it is worthy of note that this Court has never in its entire history granted one of these writs to compel a transfer.

That our conclusions as above stated are in accord with the view of the Supreme Court is made perfectly manifest by the reasons given by Chief Justice Warren for the vacation of a mandamus granted by the Seventh Circuit in *Hubert L. Will* v. *United States*, 389 U. S. 90, decided on November 13, 1967. Again and again is emphasis placed upon the "extraordinary" character of the writ. The very quotation from *Ex parte Fahey*, 332 U. S. 258, 260 (1947), we relied upon in *Torres* v. *Walsh, supra*, 221 F. 2d 319, 321, is repeated: "As extraordinary remedies, they (the Great Writs) are reserved for really extraordinary causes." That the occasional references in earlier opinions to the abuse of discretion were intended only as a gloss upon the

"really extraordinary causes" ruling is clear from the following quotation from footnote 6:

> Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as "abuse of discretion" and "want of power" into interlocutory review of nonappealable orders on the mere ground that they may be erroneous. *Hubert L. Will* v. *United States, supra*, 389 U. S. 90, 98 (1967).

The ruling thus made was concurred in by the entire court, except that Mr. Justice Marshall did not participate. The concurring opinion of Mr. Justice Black, however, used the slightly different phrase "where there are extraordinary circumstances."

There is nothing "really extraordinary" about this cause. Nor are there any "extraordinary circumstances." Whenever there is an airplane crash and a considerable number of persons are killed or injured, it is more or less inevitable that actions for recovery of damages will be brought by the survivors and by the representatives of those who lost their lives, and each will seek a state or federal forum convenient to him and one where he thinks his recovery will be as large as possible. It is also more or less inevitable, depending upon the circumstances of particular plaintiffs, their places of residence and the applicability of state laws, that some of the cases will be transferred, if all are pending in federal courts, to the court functioning in the place where the crash occurred. By the same token some of the applications for transfer will be denied. That is what has happened here. This state of affairs is not even unusual let alone "really extraordinary." As transfer motions are always addressed to the discretion of the court, it need not surprise anyone that the discretion is sometimes exercised in favor of granting the transfer and sometimes not.

Moreover, this is clearly not a case of judicial intransigence or persistent flouting of the Rules.

Petition for mandamus denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of November, one thousand nine hundred and sixty-seven.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. HAROLD R. MEDINA,
HON. PAUL R. HAYS,
Circuit Judges.

AMERICAN FLYERS AIRLINE CORPORATION, *Petitioner,*

v.

HONORABLE JOHN F. X. MCGOHEY, Judge of the United States District Court for the Southern District of New York, *Respondent.*

A petition for a writ of mandamus having been filed herein by counsel for the petitioner and argument having been had thereon,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied.

/s/ A. DANIEL FUSARO
Clerk